No. 82-1507

In the Supreme Court of the United States

OCTOBER TERM, 1982

WASHINGTON STATE DEPARTMENT OF GAME, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Indians who have exclusive fishing rights within the Quinault Reservation are entitled to take all harvestable steelhead trout that are destined to terminate their run within the confines of the Reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 694 F.2d 188. The district court's order modifying and approving the magistrate's proposed findings and conclusions (Pet. App. C1-C5) and the magistrate's report and recommendations (Pet. App. B1-B29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1982. The petition for a writ of certiorari was filed on March 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATY PROVISIONS INVOLVED

Article III of the Treaty of Olympia, July 1, 1955, United States-Quinaielts, 12 Stat. 972, is set out at Pet. 11-12. Article II of the Treaty, 12 Stat. 971, provides in pertinent part as follows:

> There shall * * * be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, * * * and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. * * *

STATEMENT

The State of Washington brings to this Court yet another chapter in the fishing rights controversy between treaty Indians and non-Indians.[1] This action involves the annual run of steelhead trout from the Pacific Ocean up the Quinault River to their spawning grounds (Pet. App. B6).[2] The mouth of the river is located on the Quinault Reservation, as is that part of the river between the mouth and Lake Quinault, and Lake Quinault itself (*id.* at B5). The river originates upstream of the lake, and that part of the river between its source and the lake is off the reservation (*id.* at B5-B6). A map of the river system and the Quinault Reservation is reproduced as Appendix B to the Brief in Opposition filed by the Quinault Indian Nation.

Steelhead trout, like salmon, generally return to their spawning grounds, either in the lower reaches of the river, on the reservation, or in the river's upper reaches beyond Lake Quinault and off the reservation (Pet. App. B6). Those steelhead that end their run on the reservation are

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[1]See *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); 459 F.Supp. 1020, aff'd, 573 F.2d 1123 (1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), remanded to district court for continuing jurisdiction, Nos. 77-3129, *et al.* (9th Cir. Sept. 14, 1979).

[2]The run extends from approximately mid-November to the end of April (Pet. App. B6).

referred to as "reservation fish," and those that continue upstream beyond the reservation are called "through fish" (*id.* at B7).

In January 1981, petitioner sought a temporary restraining order or preliminary injunction to prevent the Quinault Tribe and its members from fishing the Quinault River. Petitioner maintained that, under *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658 (1979), the Quinaults were limited to a maximum of 50% of the steelhead in any annual run, that "reservation fish" as well as "through fish" counted against the tribe's share, and that the Quinaults were in the process of catching steelhead in excess of this allocation during the 1980-1981 steelhead run. The motion was referred to a magistrate, who recommended denying injunctive relief (Pet. App. B27). The magistrate concluded that petitioner had not demonstrated that the Quinaults were exceeding their allocation of steelhead. He determined that of the steelhead entering the Quinault River during any annual run, nontreaty (*i.e.*, non-Indian) fishermen are entitled to up to 50% of the harvestable portion of the "through fish," and treaty (*i.e.*, Quinault Reservation Indian) fishermen are entitled to take all harvestable "reservation fish" as well as a maximum of 50% of the harvestable "through fish" (*id.* at B27-B28). The district court adopted the magistrate's report and recommendations with minor modifications not material to the allocation issue (*id.* at C1-C5), and the court of appeals affirmed (*id.* at A1-A14).

ARGUMENT

The decision below correctly applies this Court's prior rulings on the issue in question and does not conflict with any other decision of this Court or of any other court of appeals. Accordingly, further review by this Court is unwarranted.

1. Once again, the Washington State Game Department is seeking to deprive treaty Indians of their fishing rights. To that end, petitioner selectively quotes passages from this Court's decisions for the wholly unsupportable proposition that the Indians have somehow lost their exclusive on-reservation fishing rights. The contention is that the equal sharing formula established in the district court in 1974 and confirmed by this Court in *Fishing Vessel, supra,* 443 U.S. at 685-686 & n.27, means that non-Indians are now entitled to catch 50% of "reservation fish" — that is, fish that can be caught only on the Quinault Reservation where non-Indians have no right to fish. Petitioner disregards the fact that even if there were no Quinault Reservation fishery at all, these "reservation fish" would never arrive at the fishing areas in which Indians and non-Indians have the right to fish "in common with" each other (see Pet. App. B7, B18-B20). No court has ever held, nor has this Court suggested, that the equal sharing formula applies to such fish.

This Court has consistently recognized that Article II of the Indians' treaties secured exclusive on-reservation fishing rights. *Fishing Vessel, supra,* 443 U.S. at 683-684, 687; see also *id.* at 698 (Powell, J., dissenting).[3] The only relevant limitation on the tribes' exclusive on-reservation fishing rights that the Court has recognized is that those rights may not be exercised in such a manner as to deprive non-Indians of an opportunity to fish in common with the Indians *off* the reservation. In other words, this Court has limited the Indians' on-reservation fishing rights only with respect to

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[3]Accord *United States* v. *Washington, supra,* 384 F.Supp. at 332, 341; *Puget Sound Gillnetters Ass'n.* v. *District Court,* 573 F.2d 1123, 1126 (9th Cir. 1978); *United States* v. *Washington, supra,* 520 F.2d at 676; *Moore* v. *United States,* 157 F.2d 760, 761, 763-764 (9th Cir. 1946), cert. denied, 330 U.S. 827 (1947); *Mason* v. *Sams,* 5 F.2d 255, 258 (W.D. Wash. 1925); *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 662, 294 P. 557, 559 (1930).

"through fish." The *Puyallup* series of cases,[4] upon which petitioner heavily relies (Pet. 32-38), concerned only "through fish." In *Puyallup III*, the Court rejected the Puyallups' claim to an unrestricted right "to take steelhead *while passing through* [the] reservation" (433 U.S. 165, 177 (1977); emphasis added; see *id.* at 173-177). In *Fishing Vessel*, the Court explained that in *Puyallup III* it had "rejected the Tribe's claim to an untrammeled right to take as many of the steelhead running *through* the reservation as it chose" (443 U.S. at 684; emphasis added), so as to deprive non-treaty fishermen of their right to an equal share of the "through fish." And it is readily apparent that *Fishing Vessel* itself applied the equal sharing formula only to "through fish" (see 443 U.S. at 683-687).[5]

But we are not here concerned with "through fish" because petitioner does not contend (nor could it on this factual record) that the Quinaults are taking more than their 50% share of the "through" steelhead.[6] What

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[4] *Puyallup Tribe* v. *Washington Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*); *Washington Dep't of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165 (1977) (*Puyallup III*).

[5] *Fishing Vessel, supra*, 443 U.S. at 686 n.27, approved the equal sharing standard as a logical implementation of the Indians' right to take fish "in common" with non-Indians "at all usual and accustomed grounds and stations," a right secured by Article III of the treaties. The Indians' Article III rights pertain to off-reservation fishing and stand apart from their exclusive fishing rights on the reservation under Article II. It is thus clear that *Fishing Vessel* did not apply the equal sharing formula to the Indians' exclusive right to take "reservation fish."

[6] The record establishes that approximately 85% of the disputed run consists of "reservation fish" that would never migrate off the reservation even if the Quinaults ceased fishing, and that only 15% of the run is destined for spawning grounds on that stretch of the river that is above Lake Quinault and off the reservation (Pet. App. B18-B19). Petitioner does not contend that the Quinaults have taken so many steelhead on the reservation that non-Indians have no opportunity to catch the 7½% of the total run to which they are entitled.

petitioner seeks instead is an injunction that would prohibit the Quinaults from catching fish that will never arrive at joint (*i.e.*, "in common") fishing areas. Not only does the State (and its non-Indian fishermen) lack any legal basis for a claim to those fish, but the injunction it seeks would run counter to the management principle that it is as important to avoid under-harvesting the resource as it is to avoid over-harvesting (see Pet. App. B26-B27).

In sum, the decision below respects the exclusive on-reservation fishing rights of the Quinaults by permitting them to capture those fish that would never migrate off the reservation, and at the same time gives due effect to the provisions of Article III as to those fish that continue beyond the reservation and into the "in common" fishing areas with which that Article is concerned.[7]

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[7]As the magistrate noted (Pet. App. B24-B26), the result in this case is consistent with the disposition of fishing rights on the Columbia River. There, the situation is reversed, with non-treaty fishermen having exclusive access to fishing on the Lower Columbia, and joint-use (*i.e.*, treaty and non-treaty) fishing rights on the Columbia above Bonneville Dam. Some of the fish entering the Lower Columbia terminate their run there, and some proceed upstream to the area above the dam. The State has asserted, and the federal courts have ruled, that the non-treaty fishermen may harvest all those fish that would not migrate above the dam in any event. The treaty fishermen may take a maximum of 50% of the fish passing through the area of exclusive non-treaty fishing and into the joint-use area. See *Sohappy* v. *Smith*, 529 F.2d 570, 572 (9th Cir. 1976).

Petitioner alleges (Pet. 26-27) that the disposition below is unworkable because it is impossible to "protect" the "through fish" from the Quinault net fishery as they pass through the reservation mixed with "reservation fish." As the magistrate noted (Pet. App. B23-B24), this concern is no obstacle to the allocation adopted below. True, when a fish is taken on the reservation, it is not possible to identify it as a "reservation" or "through" fish. But it is not necessary to do so to effect the allocation. It is possible to predict the total number of steelhead that will enter the Quinault River during a given annual run, the proportions of "reservation" and "through" fish, and the proper harvest levels. The

2. Petitioner's attempt to take advantage of *Montana* v. *United States*, 450 U.S. 544 (1981), is equally unavailing. Notwithstanding the conclusion of the court of appeals that "the exact limits of the *Montana* holding are not clear" (Pet. App. A8), it is evident, as Judge Canby recognized in his concurring opinion (*id.* at A9), that the factors deemed significant by the Court in *Montana* are not present here.

In *Montana*, the Court examined a different treaty, the Treaty of Fort Laramie, June 1, 1868, United States-Crow Indians, 15 Stat. 649. After reviewing the treaty negotiations and the history of the Crow people and their reservation, the Court concluded that the bed and banks of the Big Horn River belonged to Montana and that the Crow, therefore, could not prohibit non-Indians from fishing on the river. At least two factors forcefully distinguish this case from *Montana*.

First, the Court in *Montana* noted that the Crow treaties did not even mention the riverbed or in any other manner signal a definite intent to grant it along with the reservation's uplands (450 U.S. at 552-555). Manifestation of such an intent would have overcome the presumption that at the time the treaties were signed the riverbed was held in trust for the future state (*id.* at 553). The history of the Quinault Reservation is entirely different. In 1873, the reservation's boundaries were redrawn so as to include the whole of Lake Quinault and its fisheries within the reservation in order to protect these fisheries from encroachment by non-Indians. *The Quinaielt Tribe of Indians* v. *United States*, 102 Ct. Cl. 822, 825 (1945). The Secretary of the Interior had noted in 1872 the need for additional fisheries for the Indians of the

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Fisheries Advisory Board can, on the basis of these data, apply the allocation and determine the share of each group in any given season. Steelhead can then be credited against those shares, wherever harvested. See also *id.* at B2, B28-B29; C4-C5.

reservation and recommended expansion to include the lake to meet this need, see 1 *Report of the Secretary of the Interior, reprinted in* H.R. Exec. Doc. No. 1, 42d Cong., 3d Sess. 723-725 (1872), and the lake was included in response to this recommendation. The background of this expansion thus clearly supplies the manifestation of intent required to overcome the presumption of retention for the future state.

Second, in *Montana* the Court noted that fishing was not important to the Crows' diet or way of life when the treaties were signed, and that therefore there was no indication that Congress departed from its policy of reserving the beds of navigable waters for future states (450 U.S. at 556). By contrast, it is undisputed that fishing was and remains central to the Quinaults' diet and culture. See *Fishing Vessel, supra,* 443 U.S. at 664-665; *Halbert* v. *United States,* 283 U.S. 753, 757 (1931); *United States* v. *Washington, supra,* 384 F.Supp. at 350-358.

Given these factual distinctions, the court of appeals correctly concluded that this case is controlled by *Confederated Salish & Kootenai Tribes* v. *Namen,* 665 F.2d 951 (9th Cir.), cert. denied, No. 82-22 (Nov. 1, 1982).[8] As in *Namen,* the factual distinctions between the history of the Quinaults and that of the Crow are so clearly apparent that there is no warrant for further review by this Court.[9]

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[8]In *Namen,* the court held that the Indians have a beneficial ownership interest in the south half of Flathead Lake because the treaty creating the Flathead Reservation expressly included that portion of the lake in delineating the reservation's boundaries and the Indians were dependent on fishing when the treaty was executed (see 665 F.2d at 960-962).

[9]At all events, State ownership of the bed and banks of the Quinault River and Lake Quinault would not necessarily deprive the tribe of exclusive fishing rights within its reservation boundaries. Unlike *Montana,* this case presents no issue of the tribe's authority over non-Indian fishermen, nor federal prosecution under 18 U.S.C. 1165.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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